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IN THE

Supreme Court of the United States

October Term, 1957

No. 1095

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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KAMEN SOAP PRODUCTS COMPANY, INC., *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, Kamen Soap Products Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Claims dismissing its petition in the nature of an independent bill of review to set aside a prior judgment of the Court of Claims obtained on false testimony.

OPINIONS BELOW

There is attached hereto as Appendix A the order of the Court of Claims entered December 4, 1957, dismissing the petition of Kamen Soap Products Company, Inc., and also the Court of Claims order entered March 5, 1958, denying petitioner's timely motion for rehearing. Neither of said orders is reported.

In addition there is attached hereto as Appendix B the decision of the Court of Claims in the case of *Kamen Soap Products Company, Inc.* vs. *United States,* reported at 129 Ct. Cl. 619, 124 F. Supp. 608, with respect to which relief was sought below in the independent action which gives to this petition.

JURISDICTION

The judgment of the Court of Claims was entered December 4, 1957, and a timely petition for rehearing was denied March 5, 1958 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C., 1255.

QUESTIONS PRESENTED

1. Do the provisions of Rule 54 (b) of the Court of Claims Rules (which is substantially identical to Rule 60 (b), F.R.C.P.) permit both a motion and a separate proceeding to be maintained seeking relief from a final judgment, order or proceeding obtained by admittedly false testimony discovered after the trial?

2. Does a litigant have the right to maintain an independent action for relief against a final judgment, order or proceeding, obtained by admittedly false testimony discovered after the trial, even though he has been denied such relief on motion made in the original proceeding?

3. Are the remedies of post-judgment motion and independent action, as authorized in Rule 54 (b) of the Court of Claims and Rule 60 (b), F.R.C.P., for relief against a final judgment, order or proceeding, obtained by false testimony, mutually exclusive or may both remedies be pursued by an aggrieved litigant?

RULE INVOLVED

Rule 54 (b) of the Court of Claims Rules, which is substantially identical to Rule 60, F.R.C.P. provides:

> "Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.: On motion and

upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 53 (c); (3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the Court. . . . "

STATEMENT OF THE CASE

Petitioner brought an independent action in the Court of Claims under Rule 54 (b) of the Court of Claims which is substantially identical to Rule 60 (b), F. R. C. P., to obtain relief from a prior judgment of that court. By that prior judgment, the Court of Claims dismissed petitioner's cause of action on the basis of a finding of fraud in the presentation and prosecution of said action. 129 Ct. Cl. 219, 124 F. Supp. 608 (1954).

Originally, proceedings were instituted by petitioner in the Court of Claims to recover upon a contract with the United States pertaining to the manufacture and sale to the Army Quartermaster Corps of certain soap and tallow products. In opposition the United States

interposed a plea of fraud in the prosecution of said claim. The Court of Claims ultimately found in favor of the Government on that issue and entered a finding of fraud and a judgment of forfeiture.

Subsequent to that judgment, petitioner's President was indicted and tried in the United States District Court for the District of Columbia for allegedly attempting to defraud the Government. To establish that fraud had been perpetrated, the prosecution relied upon the same three witnesses who had testified in the Court of Claims, and upon whose testimony that Court entered the finding of fraud. It developed, however, upon cross-examination of these witnesses that the documents they used as the basis for their testimony were spurious, and that, except for the use of these spurious documents to refresh their recollections, they had no independent knowledge of the matters about which they testified.

Specifically, the issue was whether petitioner had submitted a covering letter with its bid on the Army's order. That issue was the keystone as to whether petitioner's chief officer, upon whom establishment of the claim depended, was or was not credible. The three witnesses, all employees or members of the Quartermaster Corps, produced at the Court of Claims trial what purported to be an abstract of all the bids received, and what purported to have been prepared under the direction of one or more of said witnesses and what purported to bear one or more of their signatures. Based upon this purported abstract of the bids, these witnesses, upon the basis of past recollection recorded, testified that no letter had accompanied petitioner's bid, and the Court of Claims so found in its decision.

However, it developed at a subsequent hearing in the District Court criminal trial that the purported abstract was not an original, that it did not bear the actual signa-

tures of the witnesses, but only a rubber stamp facsimile, and that the witnesses had no personal knowledge as to where the original (if any) was, nor could they recall whether the document had been prepared under their direction.

If these facts had been known to the Court of Claims at the time of the hearing, the testimony of these three Government witnesses would have been inadmissible in its entirety and there would have been no basis for that Court's finding of fraud.

Petitioner brought this matter to the attention of the Court of Claims by motion under Rule 54 (b) of said Court (which is almost identical with Rule 60 (b) of the Federal Rules of Civil Procedure), but the motion was denied without a hearing. Subsequently, an independent action was brought in the same court, pursuant to the provisions of the same rule, which action was dismissed without a hearing on December 4, 1957. Petitioner's motion for rehearing was denied on March 5, 1958 and this Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT.

This petition involves a vital and novel question of the construction and application of Rule 54 (b) of the Court of Claims, which, being substantially identical to and copied from Rule 60 (b) of the Federal Rules of Civil Procedure, will necessarily affect the construction and application of the latter rule applicable to the federal courts at large. Moreover, the procedural question involved goes to the heart of the administration of justice in that it controls the rights of affected parties to seek action in the nature of a bill of review or coram nobis to review judgments secured by fraud or falsity. Should this petition not be granted those rights would be seriously and substantially impaired.

This petition involves Rule 54 (b) of the Court of Claims, *supra*, pp. 2-3, which is patterned after Rule 60 (b) of the Federal Rules of Civil Procedure, and is, in fact, a verbatim copy of that Rule in its most relevant aspects. A discussion of Rule 60 (b) is, therefore, both appropriate and necessary.

This Court's Advisory Committee on Amendments to Rules, discussing 60 (b) stated in a committee report of 1946:

> "The Committee has endeavored to ascertain all the remedies and types of relief heretofore available by *coram nobis, coram vobis, audits querela,* bill of review, or bill in the nature of review . . . it endeavored then to amend the rules to permit either, by motion or by independent action, the granting of various kinds of relief from judgment which were permitted in the Federal courts prior to the adoption of these rules, and the amendment concludes with a provision abolishing the use of bills of review and the other common law writs referred to, and requiring the practice to be by motion or by independent action."

The Government's position, briefly stated, is that petitioner, having made a motion in the Court of Claims for relief from the judgment of forfeiture, is barred from bringing this independent action. But such is not the purpose nor the effect of 60 (b), F. R. C. P., or 54 (b), Court of Claims Rules.

In Moore's *Federal Practice* (Second ed.), §60.38 [3], it is stated:

> "There are, undoubtedly, some procedural differences between the 60 (b) motion and the independent action. But the essential difference does not lie in pure procedure. It is this. The independent action affords a plain, adequate and complete remedy; and, what is perhaps more important, it affords relief, when warranted by established equitable principles, although relief by motion under 60 (b) is not obtainable because the time for making motion has run."

The procedural differences which Moore has in mind are:

(1) An independent action requires findings of fact and conclusions of law while a motion does not.

(2) A counterclaim may be asserted to an independent action, but not to a motion.

(3) Leave of the appellate court is required in making a motion under 60 (b) during the pendency of an appeal. An independent action may be maintained without such leave of court. See Moore's *Federal Practice* (Second ed.), §60.38 [3] note 15.

The requirement that findings of fact and conclusions of law be set forth in all independent actions presupposes a full and complete hearing of the issues. To deny such hearing to either party is error. In *Hadden* v. *Rumsey Products*, 196 F. 2d., 92, 96 (C.A. 2, 1952), where an action was brought to enjoin the enforcement of a judgment entered by an Ohio State Court, the court said:

> "As already stated, that court has jurisdiction to entertain an independent action to relieve a party from a judgment. The Appellee's allegations of duress, fraudulent misrepresentation and concealment, if substantiated upon a trial, may entitle them to a decree. *Without taking proof on these charges, the court entered the judgment appealed from. This was error*" (Emphasis supplied).

Because of the almost identical wording of both Federal Rule 60 (b) and Rule 54 (b) of the Court of Claims, the foregoing reasoning is equally applicable to both.

Petitioner did make a motion under 54 (b) in the original Court of Claims case but said motion was denied without hearing. Petitioner did not merely re-assert a position previously taken and disposed of by the Court of Claims, but sought, in an independent action, to establish by good and sufficient evidence the fact that fraud was in fact prac-

ticed upon the court. Petitioner sought by this independent action, to have the court enter findings of fact and conclusions of law upon the evidence presented so that a matter of such vital significance to petitioner may have been properly determined after due and deliberate consideration of all of the facts involved.

The finding of fraud and the judgment of forfeiture were based upon the original testimony in the Court of Claims of the three persons who handled the transaction for the Army Quartermaster Corps. They testified that they had no independent recollection as to whether or not a covering letter was submitted with petitioner's bid, but testified from an abstract of the bid which they said bore their signatures. Their past recollection recorded by the abstract showed that there was no covering letter submitted with the bid. They further testified that had there been a covering letter it would have shown in the abstract.

For the first time, in the trial of a criminal case, all of the foregoing witnesses, on cross-examination, admitted that the exhibit, which purported to be the abstract, did not in fact bear their signatures, that they did not know that the document was the abstract and that their prior testimony, which was based on the assumption that the exhibit was the valid abstract, was in error.

Thus, petitioner's claim for damages in a very substantial sum by reason of breach of contract (which the Army itself at one time admitted was the valid basis of a claim) was swept aside by the false testimony of the three persons who handled the transaction for the Government. Without this testimony there would have been absolutely no evidence that the covering letter had not been sent. The testimony of Mr. Kamen, President of petitioner, upon which its claim largely turned, was disbelieved, thrown out and disregarded by the court because it was assumed that he had falsely testified that he had sent the covering letter with the bid. Without the testimony concerning the abstract, which was

false, (whether intentionally or not does not matter) the Government's burden of proof as to the issue of fraud would have totally failed, and there would not have been one scintilla of evidence of a fraudulent claim or practice. Thus, a bona fide claim was thrown out of court and its owner deprived of its day in court by reason of false testimony and a rank injustice was perpetrated.

The argument that a mere motion to set aside the judgment of forfeiture without a witness having been heard, without an opportunity for the court to examine whether or not fraud had in fact been practiced constitutes a judicial determination of all the issues involved is out of keeping with our concepts. Under its equitable powers the court below must be given (or give itself) the opportunity of evaluating its prior findings in view of the testimony which would be produced at a hearing regarding the exhibit which was thought to be the original abstract. The court would then, in light of the new testimony and new facts developed by further examination of witnesses, be in a position to determine whether, in equity and good conscience, the Government should be allowed the benefit of the judgment of forfeiture.

Petitioner maintains that a mere routine denial of a motion, without a hearing, without the evaluation of equitable grounds and considerations, does violence to the statutory jurisdiction conferred upon the court to determine equitable matters in a separate action.

The language of this Court in the case of *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124-125, 100 L. ed. 1003, 1009-1010 (1056) is particularly appropriate. In that case the Communist Party appealed to the Court of Appeals for the District of Columbia, from a decision of the Subversive Activities Control Board, finding that the party was a "Communist-action" organization. During the pendency of the appeal the appellant filed a petition in the Court of Appeals for leave to adduce addi-

tional evidence. The basis of the motion was that the additional evidence became available subsequent to the Board hearings and that it would show that the testimony of three witnesses upon whom the Attorney General relied gave false testimony. The Court of Appeals denied the motion and affirmed the judgment of the Board. Certiorari was granted by this Court which, in its decision on the merits, stated:

> "* * * The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb* v. *United States*, 318 U. S. 332, 87 L. ed 819, 63 S. Ct. 608. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.
>
> "*When uncontested challenge is made that a finding of subversive design by petitioner was in part the product of three perjurious witnesses, it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's findings.* If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must duly take this fact into account. We cannot pass upon a record containing such challenged testimony. We find it necessary to dispose of the case on the grounds we do, not in order to avoid a constitutional adjudication but because the fair administration of justice requires it. * * *" (Emphasis supplied.)

Subsequently, in *Mesarosh* v. *United States*, 352 U.S. 1, 1 L. ed. 2d 1 (1956) and *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233, 2 L. ed. 2d. 234 (1957) this Court reaffirmed the foregoing concepts enunciated in the Communist Party case.

CONCLUSION

The questions presented are patently novel and of substantial importance both in the construction and application of Rules 54 (b) of the Court of Claims and 60 (b), F.R.C.P., and in establishing the scope of an aggrieved person's right to seek review of a judgment obtained by fraud or falsity. Petitioner submits that the action of the Court of Claims in dismissing its independent action was plainly erroneous. Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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